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No. 88-1977

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

In re: THE BIBLE SPEAKS,
Debtor

The Bible Speaks, Inc.
Petitioner,
v.
Elizabeth Dovydenas
Respondent

On Certiorari from the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE COALITION FOR RELIGIOUS FREEDOM IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether an apparent conflict exists among the courts of appeal on the appropriate standard of review in cases involving mixed questions of law and fact relating to potential violations of religious freedom.

II. Whether the decision below clearly departs from this Court's teaching on the chilling effect of intense judicial scrutiny of protected activities of religious bodies.

III. Whether the lower courts need guidance concerning the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions after the "deprogramming" of members of religious bodies.

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STATEMENT OF INTEREST

The Coalition for Religious Freedom (CRF) is a non-profit, tax-exempt organization first organized in the District of Columbia in 1984 under the name, Committee for Religious Freedom. CRF is engaged in efforts to inform the public about the importance of religious freedom and to highlight instances of intrusion upon religious liberties. CRF is supported by contributions from the public, from businesses and other non-profit organizations. Its informational programs include publications, documentary films, educational conferences and a monthly newspaper, *The Religious Freedom Alert*. In addition to its general informational activities, CRF assists in the education of local communities and governmental officials on constitutional guarantees of religious liberty where a specific violation of first amendment liberties has been alleged. In numerous cases, CRF has appeared as amicus curiae by providing perspective on the significance of religious freedom in our society and by analyzing the legitimate interests of church and state. For example, CRF has filed amicus briefs in cases involving the dangerous practice of "deprogramming" of members of religious bodies, one of the issues presented in this case. CRF has a vital interest both in the freedom of religious conversion and in the concomitant need for delimitation of the role of secular courts in deciding tort suits generated by successive religious conversions.

Under Rule 36.1 of this Court, the amicus has obtained the consent of counsel for the parties to file this brief. The consent letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The petitioner in this case is a church in Lenox, Massachusetts, which in 1987 had approximately 1,300 members. With the aid of the contributions of its members, the church operated a large campus that included a nursery, a school for grades K-12 and the Stevens School of

the Bible. A. 9a. In late 1984 and early 1985 the respondent, a healthy, college-educated, heiress in her mid thirties, became a "born-again" member of the church, to which she made a series of large gifts that are the subject of this litigation. Alarmed at the size of these gifts, respondent's family tricked her into going to Minnesota, where she was subjected to an intensive, six day program of indoctrination conducted by paid professional "deprogrammers," who were assisted in this program by members of her family. A. 102 a. She was bombarded with lectures, discussions, and hours of video tape recordings designed by the deprogrammers to break the faith commitments of members of so-called "cults." The attack on various religious groups included the Church of Jesus Christ, Latter-Day Saints (Mormons), the Unification Church, the International Society for Krishna Consciousness and the followers of the Rev. Jim Jones. After this intensive "deprogramming," she was persuaded not only to leave the church, but to rescind all of her gifts to the church, alleging that these gifts were the product of undue influence on the part of the church and its spiritual leader, Pastor Carl H. Stevens.

Amicus urges this Court to protect the decision to leave a church, but not at the cost of fostering litigation by former members of a church over prior contributions to the church that were made freely and voluntarily, without any coercion or fraud on the part of the church.

This Court should grant the petition for three reasons. First, the decision below has created a conflict among the circuits on the appropriate standard of appellate review in cases presenting mixed questions of law and fact concerning violations of religious freedom. This Court should resolve that conflict.

Second, the decision below departs from this Court's sound teaching on the autonomy of religious bodies. This Court should correct that error to avoid a severe chilling effect on the ability of religious bodies to raise funds to continue their protected activities.

Third, the decision below ignores the danger to fragile religious freedoms when hostility to religious con-

version is given full sway in the dangerous phenomenon of "deprogramming" of members of religious bodies. The writ should issue to allow this Court to define the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions.

ARGUMENT

I. This Court should grant the writ to resolve the conflict among the courts of appeal on the appropriate standard of review in cases involving mixed questions of law and fact relating to potential violations of religious freedom.

This case arose from a bankruptcy petition in which the bankruptcy judge allowed the respondent to rescind all of her gifts to the church, resolving all controverted facts against the petitioner. *In re The Bible Speaks*, 73 B.R. 848 (Bank. D. Mass. 1987). A. 84a-134a. Both the district court, *In re The Bible Speaks*, 81 B.R. 750 (D. Mass. 1988), A. 61a-63a, and the court of appeals, *The Bible Speaks, Inc. v. Dovydenas*, 869 F. 2d 628 (1st Cir. 1989), A. 5a-8a, declined to review those facts on the standard of review mandated by this Court in *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 480 (1988).

In *Bose* this Court required that in order to protect vulnerable first amendment freedoms, appellate courts must undertake an independent review of the entire record to "decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars entry of any judgment that is not supported by *clear and convincing proof*," *id.* at 510-511 (emphasis supplied), of some compelling governmental interest overriding the claim of a first amendment violation.[1]

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1 Professor Monaghan, who is of counsel for the petitioner, has offered a thoughtful commentary on the reasons for the *Bose* rule. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 254-259 (1985). Professor Tribe, who is of counsel for the respondent, is, of

Bose involved a claim of product disparagement. False and defamatory statements, themselves of no first amendment concern, were given heightened protection in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) because the risk of liability for mistakes would deter true speech as well as false, or would diminish the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270. For those reasons a media defendant is entitled to prevail against a public official in a libel action unless the plaintiff can show "actual malice."

This Court has afforded special protection to media defendants because they are primary institutions whereby our cherished rights of freedom of expression and of communication are preserved. *Sullivan*, 376 U.S. at 266. Since churches are the primary institutions whereby freedom of religion is preserved, a similar logic has led some courts to recognize that religious communities are entitled to at least as much protection as commercial newspapers, by extending the *Sullivan* rule to church defendants in a libel action. *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363 (1987).

It was thus not much of a leap for the lower courts to have extended the *Bose* rule beyond its immediate factual context of cases implicating the *free speech* and *free press* provisions of the first amendment to cases implicating the *religion clauses* of the same amendment. When confronted with a free exercise claim, the Court of Appeals for the Third Circuit ruled to this effect in *Presbyterian & Reformed Publishing Co. v. Commissioner of Internal Revenue*, 743 F. 2d 148, 158, n. 9 (3d Cir. 1984); and see *Bender v. Williamsport Area School Dist.*, 741 F. 2d 538, 542, n. 3 (3d Cir. 1984). When facing an establishment clause claim, the Tenth Circuit also ruled that the *Bose* rule applied. *Friedman v. Bd. of County Comm'rs*, 781 F.

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course, aware of Professor Monaghan's insightful work, and cites it favorably in his treatise. *American Constitutional Law* 872, n. 76 (1988).

2d 777, 779-780, n. 2 (10th Cir. 1985).

These cases are correct for the same reason that led this Court to reaffirm the principle of independent appellate review of first amendment claims in *Bose*, which did not represent a seismic shift in first amendment doctrine. The requirement of independent appellate review of the whole record in cases implicating first amendment values was asserted as long ago as *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927). That principle has been reaffirmed repeatedly by this Court, both in cases implicating religious freedom, *Wallace v. Jaffree*, 472 U.S. 38, 76 (1984) (O'Connor, J. concurring); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *United States v. Seeger*, 380 U.S. 163, 185-188 (1965); and *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); and in cases implicating freedom of speech, *Jenkins v. Georgia*, 418 U.S. 153, 160-161 (1974); *Jacobellis v. Ohio*, 378 U.S. 184, 188-196 (1964); and *Sullivan, supra*, 376 U.S. at 271.

Far from detracting from the importance of the principle affirmed by *Bose* and ignored by the court below, the particular outcomes of these cases on the merits enhance the significance of the principle. For example, this Court invalidated the moment of silence and prayer statute in *Jaffree*, but that result is not inconsistent with the *Bose* rule; Justice Stevens wrote the opinion for the Court in both cases. This Court reversed the conviction for breach of the peace in *Cantwell*, but that result was not inconsistent with the result in *Fiske* reversing a conviction for criminal syndicalism; what was lacking in both *Cantwell* and *Fiske* was evidence to support the conviction upon an independent appellate review of the record. This Court refused over the objections of three concurring Justices in *Sullivan* to give absolute protection to defamatory speech, *Sullivan*, *supra*, 376 U.S. at 293 (Black, J., concurring); and at 297 (Goldberg, J., concurring). As *Jenkins* and *Jacobellis* illustrate, this Court has never extended the protection of the first amendment to obscenity; see also *Miller v. California*, 413 U.S. 15 (1973). But that has not kept this Court from recognizing the importance of prompt appellate review - along the lines in-

dicated in *Jenkins* and *Jacobellis* - of cases involving first amendment claims; see, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965).

By ignoring the importance of independent appellate review of the factual predicates for the characterization of issues in a first amendment case, the court of appeals erred for the very reasons offered by Professor Tribe in his comments on *Bose*:

> "*Bose* illustrates that, for all the twists libel doctrine has taken over the years, a majority of the Court still takes *New York Times* seriously -- not trusting, as it usually does, the lower courts to apply the Court's decisions faithfully, but requiring that libel decisions receive special appellate scrutiny. *Bose* recognizes that the law has indeed evolved and undoubtedly will continue to do so; but the principle underlying *New York Times* -- freedom to criticize on issues of public importance -- remains paramount. Perhaps it was even in recognition of how dramatically the law of libel has changed over the past two decades that the Court in *Bose* underscored its own duty and pledged its best efforts to maintain continued vigilance for first amendment values."

L. Tribe, *American Constitutional Law* 872 (1988).

Similarly, it is a fair implication from this Court's free exercise doctrine that only the *best* efforts of appellate judges will do in maintaining continued vigilance for the protection of religious freedom. Since *Sherbert v. Verner*, 374 U.S. 398 (1963) this Court has required that the government show both that its interest is paramount or compelling in character and that only uniform enforcement of a statute challenged by a free exercise claimant will suffice to effectuate that interest.[2] Neither of these

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2 See, e.g., *Frazee v. Illinois Department of Employment Security*, 109 S. Ct. 1514 (1989); *Lyng v. Northwest Indian Cemetery Ass'n*, 108 S. Ct. 1319 (1988); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1046 (1987); *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981); *Wisconsin v. Yoder*, 460 U.S. 205, 220 (1972). Professor Tribe,

tests can be satisfied if appellate judges are not under an on-going duty to review the entire record in free exercise cases to determine whether a truly compelling interest is factually grounded. The alternative is that the government would win every free exercise case merely by asserting that its interest is paramount. Similarly, the less restrictive means test demands serious scrutiny of the entire record to probe whether the government's interest may adequately be served by an alternative that is factually less restrictive of religious freedom.

In this case, of course, it is not the government that is asserting its own interests, but a private party using the federal courts to effectuate a rescission of voluntary gifts to a church made while she was still a member of that church. Precisely because common law adjudication of tort claims against religious bodies does not proceed upon the predicate of a carefully reasoned legislative judgment that a religious interest must be overborne by a countervaling governmental interest, it is all the more imperative that the courts do not allow private parties to prevail easily when their lawsuits implicate first amendment values. One of the clearest ways of avoiding the erosion of first amendment freedoms by private litigants is to raise the burden of proof for the plaintiff, as this Court did in *Sullivan* and in *Bose.*

The court of appeals attempted to account for its transparent departure from *Bose* by suggesting that"the first amendment is not implicated in this case." A. 8a. Despite the obviously religious character of the communications between Pastor Stevens, court of appeals apparently concluded that these privileged communications did not implicate "beliefs rooted in religion." A. 44a, citing *Thomas v. Review Bd., supra.*[3] This remarkable conclu-

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of course, is committed in the abstract to the importance of those standards, see L. Tribe, *supra*, at 1251-1275. This case tests whether the courts will be bound to follow a practical means of giving special protection to first amendment values.

3 The court of appeals relied on dictum in *Cantwell, supra*, 310 U.S. at 306, to the effect that persons may not with impunity commit

sion, let alone the distortions of fact in this record,[4] is sufficient illustration of the soundness of the rule adopted in *Bose* and the error of the court of appeals in declining to follow that rule. It seems apparent to amicus that the

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frauds on the public under the cloak of religion. It ignored the careful limitation on that dictum in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976) (rejecting judicial authority to review claims of "arbitrariness" in compliance with church law, and leaving open the question "whether or not there is room for *'marginal court review'* under the narrow rubrics of 'fraud' or 'collusion' when church tribunals act in bad faith for secular purposes") (emphasis supplied).

4 For purposes of this argument, amicus does not contest the credibility determinations of the bankruptcy court. But a dispassionate, objective reading of the record -- along the lines indicated in *Bose* -- renders unsupportable the two crucial assertions that pass for "findings" in the district court. First, the district court concluded that Pastor Stevens' religious statements did not reflect his beliefs or the tenets of the church. A. 71a-73a. Never mind that this sort of inquiry is itself problematical, if not precluded by the teaching of this Court in *Watson v. Jones*, 80 U.S. 679 (1871), and its progeny. Focusing on this record, that conclusion is directly and repeatedly contradicted by relevant evidence that was ignored, not discredited, by the court (see, e.g., R.A. 134-135, 1694-1696, 1943-1944, 1954, 1957, 3070-3071). Second, the district court sustained the "finding" of the bankruptcy judge that the influence of Pastor Stevens over the respondent was achieved by means of nonreligious statement. A. 78a. Once again, this conclusion is at odds with the clear weight of the evidence -- including the testimony of the respondent -- when viewed dispassionately in the spirit of *Bose* (see, e.g., R.A. 99, 102, 113, 208-210, 1094, 1948-1949, 1952-1953). Although the court of appeals reached the conclusion that the "findings and rulings rest solely on secular statements and actions," A. 45a, it acknowledged that the gifts it ordered to be rescinded "might have had their seeds in the religious beliefs of [the respondent]." A. 46a. Even the bankruptcy judge noted that its "conclusion that a minister of a church, in speaking of God and the Devil, was not imparting the beliefs and practices of his church would in some circumstances be a determination that is frought [sic] with peril." A. 123a.

court below reached the astonishing conclusion that no first amendment claim is presented in this case because of its very failure to undertake independent review of the record. Only in this way may one ignore the severe impact on religious bodies that manifestly flows from a rule that the mere invocation of an unstructured tort like "undue influence" suffices to rescind charitable contributions to a religious body, see Part II, *infra*. Because the decision below is disharmonious with *Presbyterian & Reformed Publishing Co., supra, Bender, supra,* and *Friedman, supra,* this case represents an apparent conflict among the circuits requiring the resolution of this court.

II. This Court should grant the writ because the decision below clearly departs from this Court's teaching on the chilling effect of intense judicial scrutiny of protected activities of religious bodies.

Another reason why this Court should grant the writ is that the decision below departs from this Court's sound teaching on the autonomy of religious bodies. This Court should correct that error to avoid a severe chilling effect on the ability of religious bodies to raise funds to continue their protected activities. This Court has recognized from time to time the practical necessity that religious organizations, like other non-profit organizations, must solicit funds in order to carry on their protected activities.[5]

In *Sullivan, supra*, concern over the risk of chilling the first amendment rights of freedom of speech and of the press prompted this Court to set constitutional limits to recovery of damages under the rather well defined tort of libel.[6] As Justice Brennan noted in *Sullivan*, the risk of

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5 See, e.g., *Heffron v. ISKCON*, 452 U.S. 640, 647 (1981); *Larson v. Valente*, 456 U.S. 228 (1982); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

6 The tort of undue influence is far less developed than the tort of libel. Hence religious bodies that become vulnerable to a chilling effect under the tort of undue influence are no less worthy of judicial

incurring liability for damages from libel actions will cause speakers to "steer far wider of the unlawful zone," 376 U.S. at 277-79, quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1957).[7]

Here the chilling effect on first amendment freedoms is no less severe. On the contrary, this case forebodes a devastating impact on all religious organizations. Unless reversed by this Court, the decision below would permit persons hostile to a religious faith to take back all their previous donations to the church, even though made with

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protection than the media defendants protected in *Sullivan* against unrestrained damages under the tort of libel. The bankruptcy court relied on *General Council on Finance and Administration, United Methodist Church v. Superior Court*, 439 U.S. 1369 (1978) for its view that the *Watson* line of cases is inapplicable to this case. A. 127a. Justice Rehnquist in his capacity as Circuit Justice denied the stay sought by a large religious denomination in an interlocutory appeal, and wrote dicta that appears to allow civil litigation against a religious body accused of fraud. But it is a complete misunderstanding of the record in that case to suggest, as the bankruptcy court did, that there was no dispute "concerning the interpretation or propriety of the Church's doctrines or practices." To the contrary, that dispute was at the very heart of the church's protracted litigation. See E. Gaffney and P. Sorensen, *Ascending Liability in Religious and Other Nonprofit Organizations* 6-12, 42-48 (1984). In any event, the distinction between fraud and undue influence, as well as the fact that the Methodist case came before this Court in a preliminary phase of the litigation without a fully developed record, adequately distinguish that case from this one.

7 The concern that newspaper editors would censor themselves even led the concurring Justices in *Sullivan* to advocate an absolute rule protecting the press against damages for the libel of a public official. 376 U.S. at 293 (Black, J., concurring); and at 297 (Goldberg, J., concurring). See also *Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (tort of intentional infliction of emotional distress confined to leave room for parody of public figures); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (even private figure must bear burden of proving that defamatory speech is false, lest true speech be deterred).

the kind of maturity of judgment reflected in this record, by an intelligent, college-educated, 34-year-old adult who was of sound mental and physical health and who was living at home with her husband and children at the time of the donations at issue in this case.

The very fact that the court of appeals picked and chose among the respondent's gifts to the church, allowing the gift of $ 1 million to stand and rescinding the larger gift of $ 5 million planned by the same adult three months later and executed six months later, is itself a reason calling for plenary review of this case.[8]

One of the clearest statements of the chilling effect of a rule like that announced by the court of appeals was written by one of the attorneys for the respondent, Professor Tribe:

> "Once it is conceded that first amendment values are unacceptably compromised when civil courts undertake to settle religious issues, it becomes clear that allowing a legal determination about property or some other secular matter to turn on a court's answer to a religious question is a path fraught with peril: the path is one along which *unsatisfied former believers could drag the civil courts into the theological thicket by the simple expedient of suing for a refund of their prior donations to a religious organization....*
>
> The existence of dissidents is a pervasive fact

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8 For example, in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), Justice Brennan noted that the first amendment prohibits courts from probing deeply into matters of church polity and organization. *Id.* at 698, 713, 721; and see *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 691 (1970) (Brennan, J., concurring) (warning of general danger of excessive entanglement by extensive judicial inquiry into the financial structures of a religious body); and *Maryland & Virginia Eldership v. Church of God at Sharpsburg*, 397 U.S. 367, 369 (1970) (Brennan, J., concurring) (warning of particular danger of probing "into the allocation of power within a church so as to decide where religious law placed control over the use of church property").

> of religious life; their role within religious organizations can be the healthy one of spurring continuing introspection and re-examination of doctrine. But it is not hard to imagine what would occur if each potential dissenter were told: contributing to a religious organization -- your own or indeed that of a group you reject -- will give you a judicial platform from which to air your religious differences with others and potentially win a favorable verdict; all you need do in order to overcome the normal bar to civil adjudication of ecclesiastical matters is sue for a refund! Not only would such an invitation declare *open season on churches and their followers*; it could at the same time make at least some religious groups resist the very attempt to solicit donations, while inducing others -- those too desperate for resources to refrain from financial appeals -- to rigidify their doctrines and freeze or at least conceal their own evolution for fear that doctrinal change, ordinarily immune from censorship, could trigger refund-seeking litigation. It is in part for reasons such as these that the first amendment has been construed to mean that religious questions remain non-justiciable even when they do not reach civil courts independently but instead form preliminary or ancillary issues in an otherwise justiciable dispute."

L. Tribe, *American Constitutional Law* 1235-1236 (1988) (emphasis supplied).

This Court has recently clarified that a charitable contribution is not deductible for federal income tax purposes if the donor receives a measurable, tangible benefit in exchange for the gift. *Hernandez v. Commissioner of Internal Revenue*, 57 U.S.L.W. 4593 (1989). In *Hernandez*, this Court did not, in Professor Tribe's words, "declare open season on churches" by raising the prospect that anyone who changes his or her mind about a religious conversion and leaves a church may seek a court order for a refund of prior contributions to the church.

The lower courts were apparently unaware of the

limit that the first amendment places on judicial power to scrutinize the internal financial affairs of religious bodies. At any rate they do not mention *Watson* and its progeny. The writ should issue to reaffirm the principle of avoiding excessive entanglement and to avert widespread probing of internal religious matters of the sort illustrated by this record.

III. This Court should grant the writ to define the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions after the "deprogramming" of members of religious bodies.

This Court recently declined to review a case presenting the question whether a secular court may inquire into alleged "mind control" by a religious body, absent any evidence of force or threat of force. *Holy Spirit Ass'n v. Molko*, cert. denied, No. 88-1600, 109 S. Ct. 2210 (1989). *Molko* is distinguishable from this case for two reasons. First, the tort of fraud alleged in *Molko* is more difficult to prove than the vague, open-ended tort of undue influence alleged here. If this case sets the rule, churches will be in a much more vulnerable position than they are under *Molko*. Second, *Molko* came before this Court on a motion for summary judgment; this case is presented on a full trial record.

For these two reasons, this case is a better vehicle for this Court to address a problem that both cases have in common, the dangerous phenomenon of kidnapping and "deprogramming" of members of religious bodies by persons -- often family members -- who are hostile to the group that the "deprogrammed" person has joined. Left unchecked by this Court, this dangerous tendency may do serious damage to the core religious freedom of conversion, implicitly protected by this Court as recently as *Hobbie*, *supra*.

In this case, on the pretext that a birthday party was planned for her father, respondent travelled alone from Lenox, Massachusetts, to a specially rented house in Min-

nesota, where she was subjected to six days of faith-breaking indoctrination conducted by paid professionals, together with members of her family. A. 102 a. She was bombarded with lectures, discussions, and hours of video tape recording about various purported "cults," including the Mormon Church, the Unification Church, the International Society for Krishna Consciousness and the followers of the Rev. Jim Jones. *Id.*; Joint Appendix filed with Court of Appeals, vol. 1, pp. 571-72; *id.* vol. 2, p. 1223.

The present case and *Molko* are but two cases in which former members of the religious groups have sued the groups, claiming psychological injury or seeking the return of money contributed on fraud-related theories.[9] The surprising feature shared by the respondent in this case and by virtually all the plaintiffs in the suits against new or controversial religions is that those who pursue lawsuits abandoned their affiliation with their former religious groups under coercive "deprogramming," euphemistically called "exit counseling" by the court of appeals and the bankruptcy court. A. 33a, 102a-103a. That the myriad former devotees of minority religions who left without the midwifery of deprogrammers seem far less inclined to sue indicates that deprogramming, for all its pseudo-psychological jargon, is a battle between different faiths for the minds of believers. The fervor shared by many who have undergone the deprogramming process, however it turns out, mirrors the religious passion of those who participate in it.

The deprogramming phenomenon began in San Diego in 1971 with Ted Patrick's almost inadvertently

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9 See, e.g., *George v. International Society for Krishna Consciousness*, No. 4th Civ. G000399 (Cal. App.) (multi-million dollar damages for emotional distress); *Murphy v. ISKCON of New England*, NO. A.C. 88-P-1209 (Mass. App.) (same); *Christofferson v. Church of Scientology*, 644 P. 2d 577 (Ore. App. 1982) (refund of moneys paid for religious services sought on grounds of fraud and undue influence); *Wollersheim v. Church of Scientology*, No. Civ. B 023193 (Cal. App.) (same).

talking to a friend's son out of his affiliation with the Children of God. Within a few years, more than a thousand persons disappeared from American religious communities for deprogramming.[10] Patrick usually resorted to forcible kidnapping, as he admitted in his own account of his exploits. T. Patrick, *Let Our Children Go* 76-77 (1976). Despite the illegal form of his initial intervention, police leniency and jury sympathy allowed Patrick forcibly to seize the members of religious groups.[11]

Ted Patrick's adventures were followed, almost immediately, by the formation of a number of anti-cult, "parent power" groups, beginning in San Diego. Soon, deprogrammers-by-force were joined by a growing retinue of lawyers and frequently self-anointed mental heath professionals, and a network of "safe houses" was established. Unbound, Inc., the deprogramming center at which respondent received indoctrination after leaving Minnesota, is a direct outgrowth of this aspect of the deprogramming phenomenon. See *Daily Iowan*, Oct. 17, 1988; see also Boothby, *Government as an Instrument of Retribution for Private Resentments*, in *Government Intervention in Religious Affairs* 79, 83-94 (D. Kelley ed. 1986); A. Shupe and D. Bromley, *The New Vigilantes* 87-90

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10 See B. Sipchen, *The Cult Wars - Ten Years After Jonestown, Battle Intensifies Over Influence of "Alternative" Religions*," Los Angeles Times, Nov. 17, 1988 § 5, at 1; Kilbourne and Richardson, *Cultaphobia*, 61 *Thought* 258 (1986); Robbins, *Cults, Brainwashing and Counter-subversion*, 446 The Annals 78 (1979).

11 "[Patrick] sometimes notified police in advance about his activities; law enforcement officers looked the other way when an abduction was taking place, claiming it was, after all, a family affair." *Liberty*, March/April 1975, at 11. "Numerous instances have been recorded in which police officers were present at the time of the forcible abductions and allowed parents and deprogrammers to forcibly remove U[nification] M[ovement] members from the scene.... [D]eprogrammers being prosecuted for false imprisonment were able to request jury trials and rely on the emotional impact of parental [and psychiatric] testimony ... to sway enough jurors to prevent conviction." A. Shupe and D. Bromley, *The New Vigilantes* 134 (1980).

(1980); J. Biermans, *The Odyssey of New Religion Today* 113-17 (1988).

An increasing involvement by psychiatrists and social workers gave apparent legitimacy to deprogramming, and the involvement of lawyers led to the development of non-violent means of commencing and conducting deprogrammings. Michael Trauscht, a Tucson psychotherapist, and Wayne Howard, an Arizona attorney, through their Freedom of Thought Foundation, apparently devised and undoubtedly marketed the idea of gaining control of members of religious groups though court-ordered temporary conservator-ships. Significantly, a conservatorship was eventually sought against the respondent, although the court below found it to have been obtained by "consent" after respondent first spent one week in Minnesota and "a few more weeks" in the Unbound, Inc., center in Iowa. A. 103a.

The essential religious nature of the deprogramming system is evident from the behavior expected of those who have been deprogrammed. Lengthy "rehabilitation"--for which families were charged substantial sums--frequently included the requirement of assisting without pay in other deprogrammings. As noted above, rehabilitated apostates were a ready source--perhaps the only source--of plaintiffs to file suit against their former churches. They gave public speeches and wrote books, exhorting that others needed to be saved from the demonic control of the "cult." Thus, for many it was both a new career and a new true "religion."[12]

After several legal challenges to the use of involuntary conservatorships, see, e.g., *Katz v. Superior Court*, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977), this device has diminished. Perhaps this has been because

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12 See, e.g., Edwards, *Crazy for God* (1979); Underwood and Underwood, *Hostage to Heaven* (1979); Wood and Vitek, *Moonstruck: A Memoir of My Life in a Cult* (1979); Freed, *Moonwebs: Journey into the Mind of a Cult* (1980); Durham, *Life Among the Moonies: Three Years in the Unification Church* (1981); Kemperman, *Lord of the Second Advent* (1981); Swatland and Swatland, *Escape from the Moonies* (1982).

when Professor Tribe speaks, courts listen.[13] But as this record suggests, neither deprogrammings by trick, A. 32a ("the family's ruse worked"), nor - in more extreme cases - forcible kidnappings have been eradicated.[14] Indeed, to a considerable extent, when deprogrammings are not accomplished by illegal means or, as the *Katz* court put it, the "misuse of the state insanity-guardianship or conservatorship statutes," *id.*, they should be the subject of sociological, religious and historical --but not judicial-- interest. The right of the new religions to win converts is necessarily counterbalanced by the right of others to do the same.

The danger, squarely presented by this case, is that the essentially religious nature of the conversion process called deprogramming will be misunderstood by trial judges and juries that are puzzled by new religious movements and skeptical of religious faiths that require intense and absolute commitment. Although the methods of deprogrammers have changed over the years, the underlying nature of the process is no different.

In the heyday of involuntary conservatorships against church members, many trial judges were willing to enter orders ex parte based on the affidavits of psychotherapists who had not interviewed or treated the

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13 According to the conservatorship theory advanced by the trial court in *Katz*, "the child is the child even though a parent may be 90 and the child 60." Professor Tribe agrees that this ruling "was properly reversed" because it "stretched the umbilical cord to the grave" and elevated the rights of the family over those of the church and the individual religious adherents. Tribe cites his colleague at the Harvard Divinity School, Professor Harvey Cox, for the view that "according to the Gospel of Mark, Jesus was a candidate for 'deprogramming,' since his own family thought he was berserk and his religious leaders said he was possessed by the devil." L. Tribe, *American Constitutional Law* 1300-1301 (1988).

14 Professor Tribe has also noted that where deprogrammers act without legal authorization, "courts are increasingly willing to hold them liable for false imprisonment and other torts, as well as for civil rights claims." *American Constitutional Law* 1301, n. 30.

prospective conservatee. See *Katz v. Superior Court*, *supra*. Because the religious dispute was cast in the guise of a familiar and superficially secular proceeding, a conservatorship, the lower courts need guidance about the extent to which the religion clauses nevertheless limit judicial intervention in disputes between a church and a former member. When, as in the present case and similar suits, disputes arising out of what may most accurately be described as a conversion to a religion followed by a conversion away from that religion have been brought to civil courts in actions sounding in tort, the lower courts also need guidance about their paramount duty to protect religious liberty. The writ should issue to allow this Court to define the constitutionally circumscribed role of secular courts in deciding tort suits generated by successive religious conversions.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari.

Respectfully submitted,

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